STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2009
v	No. 278876 Washtenaw Circuit Court
JAMES HOLLAND, JR., Defendant-Appellant.	LC No. 06-000620-FH

Before: Murray, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of four separate counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, one count of armed robbery, MCL 750.529, and one count of larceny in a building, MCL 750.360. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 56 to 80 years' imprisonment for each CSC I conviction and for the armed robbery conviction and of five to eight years' imprisonment for the larceny in a building conviction. He appeals as of right. We affirm.

First, defendant argues the trial court abused its discretion when it granted the prosecution's motion to admit prior bad acts evidence pursuant to MRE 404(b)(1). We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Other-acts evidence is admissible to establish a scheme, plan, or system, MRE 404 (b)(1), but it is not properly admitted to show a defendant's propensity to commit an offense, *People v Magyar*, 250 Mich App 408, 414; 648 NW2d 215 (2002).

The prior bad acts evidence admitted against defendant involved two prior sexual assault incidents against two other women. Both women testified at the motion hearing and described their respective assaults to the trial court; the similarities between these assaults and the assault in this case support the trial court's conclusion that the evidence was relevant to establish defendant's identity and a common plan or scheme. In particular, the testimony of the three victims indicates the following similarities in each incident: (1) the victim was attacked while she was alone by a man armed with a weapon, (2) the man penetrated or attempted to penetrate the victim orally, vaginally, and anally, (3) the man exhibited signs of erectile dysfunction, (4) the man stole or attempted to steal money, and (5) the man took action to prevent the victim from

seeing his face. These extensive similarities could reasonably be viewed as particularized evidence suggesting that the incidents were likely perpetrated by the same assailant as part of a common plan or scheme, particularly because all the incidents occurred in Ypsilanti. See *People v Kahley*, 277 Mich App 182, 185; 744 NW2d 194 (2007) ("Evidence of uncharged acts may be admissible to show that the charged act occurred if the uncharged acts and the charged act are sufficiently similar to support an inference that they are manifestations of a common plan or scheme."). Harold Raupp, a polygraph examiner, testified that defendant admitted to attacking a female in the course of a robbery at a tanning salon, and one of the uncharged incidents occurred at a tanning salon. Raupp also testified that defendant admitting to "taking control of a female" at the apartment complex where the other uncharged incident occurred. These circumstances reasonably support a determination that defendant committed the uncharged acts, so evidence that the charged assault was part of a common plan or scheme of attacking unarmed women was relevant to establishing defendant's identity as the perpetrator of the charged attack.

Raupp also testified that defendant admitted having committed a sexual attack on a woman in a building at the location (Eastern Michigan University) and date of the charged incident. Defendant notes that the victims in both uncharged incidents expressed that they could not identify whether he was their assailant. Accordingly, the linchpin for identifying defendant as the assailant in those two uncharged acts (at least for purposes of this case) was Raupp's testimony about defendant's confession. Given that Raupp also testified that defendant effectively confessed to the charged incident, it might initially seem that the additional other-acts evidence lacked significant additional probative value because Raupp's testimony that defendant confessed to the charged act made his testimony that defendant confessed to additional crimes insignificant. However, it is reasonable to conclude that evidence that defendant committed the other uncharged assaults, strongly established by several interlocking facts (namely, defendant identifying the locations of the uncharged incidents to Raupp and the victims' testimony confirming that they were assaulted at those locations), served to strongly corroborate the truthfulness of defendant's confession to Raupp that he committed all three assaults. In this regard, the similarity of the incidents reflects that they were manifestations of a common plan or scheme for sexually assaulting women. Further, it is reasonable to presume that the incident at Eastern Michigan University may have received some publicity, so it is plausible to believe that defendant might have falsely confessed to that incident in isolation. However, evidence that defendant essentially confessed to two highly similar incidents by admitting to knowledge of their locations makes it far less plausible to conclude that defendant's admissions to Raupp were contrived. Furthermore, the trial court provided a limiting instruction to the jury after the prior bad acts evidence was admitted. A limiting instruction that cautions the jury not to infer that a defendant had a bad character and acted in accordance with that character protects a defendant's right to a fair trial. *People v Smith*, 243 Mich App 657, 675; 625 NW2d 46 (2000). Therefore, the trial court did not abuse its discretion by admitting the prior bad acts evidence under MRE 404(b)(1) to establish identity and a common scheme.

Further, even if there were any error in the admission of the other-acts evidence at issue, reversal would be unwarranted in light of the independent overwhelming evidence of defendant's guilt. Error in the admission of the evidence is not a ground for reversal merely if "it is more probable than not that the alleged error affected the outcome of the trial in light of the weight of the properly admitted evidence." *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). As set forth above, Raupp testified that defendant admitted that he committed a sexual

attack in a building at Eastern Michigan University on the date that the victim was sexually assaulted at the university. Further, a mixture of DNA belonging to defendant and the victim was found on pieces of a condom wrapper at the scene, and a forensic scientist testified that only about four people in Michigan could be potential contributors to the mixture. Given this overwhelming evidence of defendant's guilt, the admission of the other-acts evidence would not have affected the outcome of the trial.

Next, defendant argues that his trial counsel was ineffective because his counsel failed to retain a DNA expert to rebut the damaging DNA evidence that the prosecution presented at trial and because his trial counsel did not file a motion to suppress the victim's in-court identification of him as her attacker. We disagree. Defendant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied him a fair trial." *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). "To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.* at 146.

The record does not support defendant's claim that his counsel failed to obtain a DNA expert in this case. The trial court record reflects that defense counsel requested funds for obtaining a DNA expert to review the DNA evidence and testify if necessary, and the trial court granted these funds. Defense counsel later requested additional funds, and this request was also granted. We cannot conclude that defense counsel failed to obtain an expert.

Based on the record, we conclude that defense counsel's decisions not to have a DNA expert witness testify at trial and not to further question the prosecution's DNA expert on rebuttal were discretionary decisions that deserve deference as matters of sound trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We will not second-guess these decisions with the benefit of hindsight. *Id.* Defense counsel is ineffective for failing to call a witness only if it deprives defendant of a substantial defense, i.e., a defense that might have made a difference in the outcome of the trial. *Id.*; *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). In this case, defense counsel simply made a strategic decision not to have an expert testify to the findings uncovered by the DNA analysis. The prosecutor presented substantial DNA evidence, including two pieces of condom wrapper containing a mixture of the victim's and defendant's DNA. Further, defense counsel cross-examined Heather Vitta of the Michigan State Police DNA Unit and elicited testimony from her that approximately four out of ten million people would have the same DNA as defendant. Nothing in the record indicates that trial counsel's performance fell below an objective standard of reasonableness considering the evidence presented.

Defendant also argues his counsel was ineffective for failing to file a motion to suppress the victim's in-court identification of defendant. We disagree. "An identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). We may analyze the following factors to determine whether an independent basis exists for the admission of an in-court identification:

> (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the

> criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).]

After considering the totality of the circumstances, we conclude that the in-court identification was not unnecessarily suggestive. The police never suggested to the victim that a particular individual committed these offenses. Rather, the victim came forward with the description and provided sufficient independent information regarding defendant's identity. Because the in-court identification was proper, any motion to suppress the identification would have been futile. Trial counsel is "not ineffective for failing to file a meritless motion." *People v Unger*, 278 Mich App 210, 255; 749 NW2d 272 (2008). Therefore, defense counsel was not ineffective for failing to file the motion to suppress.

Defendant also claims that the trial court erred when it admitted his tape-recorded confession. We disagree. Defendant had moved to suppress his confession in the trial court, which denied his request after a *Walker* hearing.[1]

"This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence." *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). We examine the entire record and we make an independent determination whether the confession was voluntary based on the totality of the circumstances. *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998). We review the trial court's findings of fact for clear error. *Id.* at 68. We review de novo issues of law, such as the application of a constitutional standard to uncontested facts. *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000). We defer to the trial court's determinations regarding the credibility of the witnesses at a *Walker* hearing. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005).

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *Akins*, *supra* at 564, citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). We may consider the following nonexhaustive list of factors in making this determination, although no one factor is dispositive:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was

[1] *People v Walker* (*On Rehearing*), 374 Mich 331, 338; 132 NW2d 87 (1965).

> injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.*, quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

After reviewing the evidence presented at the hearing, we conclude that the trial court's findings of fact were not clearly erroneous, and the totality of the circumstances indicates that defendant's confessions on January 12 and 13, 2006, were voluntary. Defendant was 39 years old when he made his confession; he had some post-high school education, and the interviewers noted that he was articulate. Defendant also had a record of other juvenile and adult convictions, indicating that he had experience with the criminal justice system. In particular, defendant indicated that he had been read his *Miranda* rights and understood them when he was a juvenile. Further, defendant was advised of his *Miranda* rights during a January 6, 2006, interview and requested an attorney, which halted the questioning. This earlier request indicates that defendant understood his rights and how to invoke them. The record also reflects that defendant was advised of his *Miranda* rights on several occasions throughout the interviews on January 12 and 13, 2006, and each time defendant indicated that he understood his rights and signed the waiver form. There was also no evidence of an unnecessary delay in bringing defendant before a magistrate, that defendant was injured, drugged, or intoxicated,[2] or that defendant was physically abused or threatened with physical abuse.[3]

We further defer to the trial court's finding that defendant was not suffering from ill health and did not inform the interviewers of any health problems. Instead, the evidence presented at the *Walker* hearing indicated that on January 6, 2006, the day after he turned himself in for a parole violation, defendant exhibited no symptoms of drug withdrawal. Further, defendant's interviewers testified that he did not exhibit symptoms of drug withdrawal during the interviews on January 12 and 13. In addition, no evidence indicates that defendant complained to the prison staff or the interviewers regarding any alleged ailments or that he requested or received medical treatment.

We also hold that the trial court's finding that defendant was not deprived of food or sleep was not clearly erroneous. The record reflects that defendant was provided food in the afternoon on January 12, 2006, and breakfast and lunch on January 13, 2006. Harold Raupp, the polygraph examiner, testified that defendant told him that he had eaten. Defendant also acknowledged that he was given food on January 13;[4] defendant cannot argue that he was deprived of food when he simply chose not to eat the food offered to him. Moreover, although defendant testified that he slept poorly or could not sleep in the holding cell at the Washtenaw

---

[2] In particular, defendant testified that he did not request or receive any illegal or legal drugs while in jail.

[3] Defendant's interviewers testified that defendant was not physically abused, and defendant did not refute these statements.

[4] Specifically, defendant testified that he was offered a hamburger on January 13 but was not hungry at the time.

County Jail, there was no evidence that the interviewers or the corrections officers purposely deprived him of sleep. In addition, although defendant might have been tired during the interview, the interviewers noted that he was nonetheless coherent, articulate, and indicated that he wanted to proceed with the interview. In fact, Raupp refused to administer the polygraph examination on the night of January 12 even though defendant wanted to continue, because Raupp believed that defendant was too tired and he wanted defendant to rest that night and come back the next day. The next day, defendant exhibited no signs of extreme sleep deprivation and indicated that he wanted to take the polygraph test.

We also find that the trial court did not clearly err in concluding that defendant was not subjected to several hours of coercive questioning. The record reflects that the interviewers originally planned to talk to defendant only regarding his role as a witness in an upcoming murder trial. Years earlier, defendant had told police that the suspected murderer, who was slated to go to trial in February of 2006, told defendant about the 1991 homicide. When the police spoke with defendant in January 2006, however, he changed his story, indicating that he was actually present during the murder when the suspected murderer committed it. The police then wanted to give defendant a polygraph test to verify his statements. During defendant's interview with Raupp before the polygraph examination, defendant volunteered that he had "aces up his sleeve," and that he was the man "they were looking for." Defendant indicated "that he was going to lay it on the table. He was going to lay it all out." Defendant then revealed his participation in crimes about which Raupp had no previous knowledge, and Raupp attempted to redirect defendant's attention to his knowledge as a witness in the murder case. Raupp testified that defendant never answered questions in an automatic manner during these conversations and that he was articulate and eager to proceed.

Additionally, the record reflects that defendant was in jail since January 5, 2006, because of a parole violation, and he was interviewed on January 12 beginning late in the afternoon and ending at approximately 9:00 p.m. Raupp refused to administer the polygraph examination at 9:00 p.m. because defendant looked too tired. The polygraph test and interview on January 13 began at approximately 9:00 a.m. and lasted until approximately 11:00 a.m. or 12:00 p.m. Defendant was given breaks, food, and water. After carefully reviewing the testimony presented at the *Walker* hearing and the portions of defendant's tape-recorded statements played for the trial court, we conclude that the trial court did not clearly err in finding that defendant was not coerced into making a statement and that he was actually speaking in full sentences, explaining why he desired to confess. Based on the record evidence, we defer to the trial court's decision to credit the interviewers' testimony and the tape-recorded evidence over defendant's testimony and assertions that he was subjected to hours of coercive questioning. *Tierney*, *supra* at 708.

Defendant also argues that his request for counsel during an interview conducted on January 6, 2006, is sufficient reason, standing alone, to suppress his statements and confession on January 12 and 13. Once a defendant invokes his right to counsel during custodial interrogation, this request must be honored "*unless the accused himself initiates* further communication, exchanges or conversations with the police." *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982), quoting *Edwards v Arizona*, 451 US 477, 484; 101 S Ct 1880; 68 L Ed 2d 378 (1981) (emphasis in original). This rule also applies where the police subsequently attempt to question the defendant regarding a matter unrelated to the initial interrogation. *Arizona v Roberson*, 486 US 675, 687; 108 S Ct 2093; 100 L Ed 2d 704 (1988).

Regardless, the record reflects that defendant initiated the discussion about his involvement in the case at bar and that he was not being interrogated at the time he confessed. The interviewers only intended to ask defendant about his knowledge as a witness against the suspected murder in a homicide investigation. Raupp knew nothing about defendant's involvement in other crimes and he tried to redirect the conversation back to defendant's knowledge as a witness in the murder case. An "interrogation" is "express questioning and [] any words or actions on the part of police that the police should know are reasonably likely to elicit an incriminating response from the subject." *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). See also *People v McCuaig*, 126 Mich App 754, 760; 338 NW2d 4 (1983) (no interrogation occurred where the police informed the defendant of the charge against him and why the police believed the defendant was responsible, because the police statements were not intended to elicit a response, but to provide information). The questions posed to defendant were directed toward his knowledge as a witness in a homicide investigation in which defendant was not a suspect; these questions were not reasonably likely to elicit information about the case at bar.

Defendant also alleges that his confession is inadmissible because it was induced by a promise. We disagree. The existence of a promise is just one of the circumstances to consider in examining whether, under the totality of the circumstances, the statement was made voluntarily. *People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997). Raupp testified that defendant first introduced the topic of speaking with his family, although defendant claims that Raupp brought it up. We find no basis to upset the trial court's determination that Raupp's testimony was more credible on this issue. See *Tierney*, *supra* at 708. Considering that Raupp had no knowledge of defendant's other crimes before defendant told him, Raupp had no reason to promise defendant anything in order to obtain a confession. In fact, Raupp was unaware that there was even the possibility of obtaining a confession or confessions. In addition, Raupp did not have the authority to grant defendant's request to see his family. To the extent there was any promise, it was merely Raupp's promise to pass along defendant's request to see family to Raupp's supervisors. Accordingly, the record does not support a finding that defendant was induced or coerced into making the incriminating statements, and the trial court did not err in holding that defendant's incriminating statements were not improperly induced by a promise.

Finally, defendant argues that the trial court abused its discretion when it sentenced him to prison terms of 56 to 80 years because these sentences exceed his life expectancy. In this regard, defendant argues that *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), should be followed as controlling precedent for this Court. We must reject this argument because our Supreme Court has effectively overruled *Moore*. *People v Lemons*, 454 Mich 234, 258-260; 562 NW2d 447 (1997); and *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). Under *Lemons* and *Merriweather* it is immaterial whether defendant's sentences exceed his life expectancy. [5]

[5] At oral argument, defendant's attorney, with the prosecutor's permission, made an oral motion to remand this case to the lower court to conduct a *Ginther* hearing. See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). After accepting and considering this oral motion and reviewing the lower court record, we deny defendant's motion to remand for a *Ginther* hearing.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Alton T. Davis